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Before the
Federal Communications Commission
Washington, D.C. 20554

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OCT 24 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
International Settlement Rates)
)
)

IB Docket No. 96-261

Opposition of MCI Telecommunications Corporation
To the Philippines Parties' Petition For Reconsideration

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TABLE OF CONTENTS

Summary	i
Introduction and Background	1
I. The Commission Has Acted Within its Jurisdiction under Section 201, 205 and 211 of the Communications Act.	3
A. Section 201	3
B. Section 205	4
C. Section 211	8
D. Review of Conduct Outside the United States	9
II. The Commission's Order is Consistent with International Obligations.	11
A. International Telecommunication Union Regulations.	11
B. International Comity	12

Summary

There can be no dispute that the Commission has the authority under the Communications Act ("the Act") to declare rates and practices relating to international communications to be unjust and unreasonable, and to prescribe rates and practices that are just and reasonable. The *Benchmarks Order* is a reasonable and necessary exercise of that authority. The order establishes guidelines for the rates that U.S. carriers pay for international service inputs which are ultimately reflected in the rates charged to U.S. consumers for international switched telecommunications services. As such, the Order is consistent with past Commission ratemaking practices under Sections 201, 205 and 211 of the Act.

In addition to being within the Commission's statutory authority, the *Benchmarks Order* is fully consistent with the Regulations of International Telecommunication Union. In particular, the *Benchmarks Order* represents a significant step in implementing the ITU-T Recommendation calling for cost-oriented rates. There is nothing in the International Telecommunication Regulations that precludes the Commission from adopting the *Benchmarks Order*. Indeed, the preamble to the ITR recognizes the sovereign right of each country to regulate telecommunications. That is precisely what the *Benchmarks Order* achieves.

The petition of the Philippines parties should therefore be denied.

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The *Benchmarks Order* applies to U.S. carriers that are authorized to operate by the Commission and are well within its lawful jurisdiction. The Order is a measured response to a well-recognized problem that has a particularly pernicious impact on U.S. carriers and consumers. According to the latest statistics, U.S. carriers paid \$5.6 billion in settlement payments to foreign carriers in 1996, up from \$4.9 billion in 1995, and it is estimated that well over 70 percent of that total is an above-cost subsidy from U.S. consumers to foreign carriers. These high settlement rates are a result of historically excessive accounting rates, which many foreign carriers have been unwilling to reduce to cost.

The *Benchmarks Order* fulfills the Commission's statutory mandate to ensure that U.S. consumers receive communications services at reasonable rates. The order also addresses the potential for competitive distortions in the U.S. market for international services. The Commission made clear that by establishing benchmark settlement rates, it was not attempting to set foreign carriers' costs; rather, it was setting a cap on the amount that U.S. carriers may pay for a component of international service, which in turn is reflected in U.S. consumer rates for international service.² The Order merely requires U.S. carriers settle their international traffic at or below a threshold rate which the Commission has concluded is reasonable based on an analysis that is fair and objective. The potential indirect effect on foreign carriers does not invalidate the Commission's rules. Indeed, if the petitioners' arguments were valid, it would mean that the rates which U.S. carriers pay for key international inputs are essentially beyond the regulatory jurisdiction of all nations.

² *Benchmarks Order*, ¶ 293.

I. The Commission Has Acted Within its Jurisdiction under Sections 201, 205 and 211 of the Communications Act.

The Philippines petitioners incorrectly argue that the Commission lacks the authority to determine the reasonableness and lawfulness of charges and practices related to international communications, and that the Commission has no authority to prescribe a rate or practice that is just and reasonable in connection with this service.³ Sections 201(a), 201(b), and 205 of the Act explicitly provide the Commission with the necessary authority to regulate the international settlement “charges” and “practices” of U.S. carriers.⁴ Accounting rates are bundled, end-to-end, per-minute charges which U.S. and foreign carriers negotiate for international circuit-switched calls. While it is obvious that one component of the international accounting rate is foreign termination, that by no means defeats the Commission’s jurisdiction to exercise its regulatory oversight to ensure the lawfulness of the accounting rates U.S. carriers negotiate with foreign carriers.⁵

A. Section 201

The Philippines parties argue that the Commission is wrongfully exercising its authority over foreign carriers. That, however, is not the case. The Commission’s Order applies to *U.S. carriers*.⁶ The Commission determined that the impact on the rates paid by U.S. consumers because of the above-cost accounting rates paid by U.S. carriers to

³ Philippines parties Petition at p. 6.

⁴ 47 U.S.C. §§ 201(a), 201(b), and 205.

⁵ *RCA Communications v. United States*, 43 F. Supp. 851 (S.D. N.Y. 1942). The court found that the Commission has the statutory authority to regulate the settlement process between a U.S. carrier and foreign carrier under Section 201(b). Regulations that have an indirect impact upon foreign carriers were found to be lawful. The court said that while the Commission’s order indirectly affects foreign countries, the order operates directly only on persons within the United States. The court went on to say that “an indirect effect on outsiders does not militate against its validity.”

⁶ Philippines parties Petition at p. 7.

foreign carriers is unjust and unreasonable. The Commission therefore determined the maximum levels at which U.S. carriers will be authorized to settle their international traffic.⁷ The fact that one party to the accounting rate negotiations is a foreign carrier, and outside the Commission's jurisdiction, does not prevent the Commission from acting on the U.S. end to prevent unjust and unreasonable rates and practices that directly impact U.S. consumers.

The Act covers international communications as well as domestic communications. Nothing in Section 201(b) prevents the Commission from requiring that settlement charges and practices contained in agreements between U.S. carriers and foreign carriers be just and reasonable.⁸ To read Section 201(b) as narrowly as the Philippines parties suggest, would essentially negate the intent of Congress to include international communications within the purview of the Commission's authority to protect the public interest.

B. Section 205

a. Substantive authority

The Philippines parties further contend that the Commission has improperly exercised its prescription authority under Section 205.⁹ In so arguing, the petitioners misinterpret both the Commission's authority and the procedural requirements under this

⁷ 47 U.S.C. § 201. This section requires that all charges, practices, classifications, and regulations for and in connection with foreign communication service be just and reasonable, and any such charge, practice, classification, and regulation that is unjust and unreasonable is unlawful.

⁸ Section 201(b) states that nothing in the Act or in any other provision of law shall be construed to prevent a common carrier subject to the Act from entering into or operating under any contract with any common carrier not subject to the Act, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest.

⁹ 47 U.S.C. § 205. If the Commission determines that the charges and practices imposed on U.S. carriers to terminate their traffic are unjust or unreasonable, the Commission may prescribe charges and practices that are just and reasonable.

section. Section 205 authorizes the Commission to prescribe just and reasonable settlement rates that U.S. carriers pay to foreign correspondents.¹⁰ This power, which is applicable to international communications under Section 2(a) of the Act,¹¹ includes the authority to “make an order that the carrier or carriers shall cease and desist from such [an unreasonable practice or charge].” Settlement rates constitute a practice or charge under Section 205. Therefore, as is the case with its authority under Section 201, the Commission has the power to determine and prescribe what are just and reasonable charges or practices. This power extends to contract rates whenever the Commission determines the rates in those contracts to be unlawful.¹² The Commission has exercised that authority in the *Benchmarks Order* by concluding that it would be an unjust and unreasonable practice or charge for U.S. carriers to pay settlement rates above the relevant benchmark rate.

The Philippines parties contend that the Commission unlawfully extended its prescription authority beyond the United States.¹³ That is not the case. The Commission used publicly available data to determine a reasonable level at which *U.S. carriers* are to settle their international traffic, and it ordered *U.S. carriers* not to exceed that level when settling with foreign carriers. In exercising its authority to prescribe just and reasonable

¹⁰ 47 U.S.C. § 205(a). This section declares that “the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge and what classification, regulation, or practice is or will be just, fair and reasonable.

¹¹ 47 U.S.C. § 152(a). “The provisions of this act shall apply to all interstate and *foreign communication*...”

¹² *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) and *United Gas Co. v. Mobile Gas Corp.* 350 U.S. 332 (1956). The so-called *Sierra-Mobile Doctrine* covers private contracts under the Federal Powers Act and Natural Gas Act respectively, and stands for the proposition that regulatory agencies may review private contracts and determine whether they are in the public interest.

¹³ Philippines parties Petition at p.7.

rates, the Commission properly determined the elements on which to base the costs of terminating traffic,¹⁴ and it was well within its jurisdiction to rely on the publicly available tariff data of foreign carriers to establish just and reasonable benchmark rates, and to prescribe such rates for U.S. carriers.¹⁵

b. Procedural issues

Having failed to make a persuasive argument that the Commission lacks the authority under the Act to prescribe a benchmark settlement rate for U.S. carriers, the Philippines parties attack the *Benchmarks Order* on procedural grounds.¹⁶ They contend that if the benchmark rate is a prescription, then a hearing was required in order to issue such a prescription. However, the Commission did in fact hold a hearing through its rulemaking process, where it accepted evidence and made a determination on the settlement rates to be paid by U.S. carriers. Under Section 205, the Commission may, on its own initiative, hold a hearing for the purpose of prescribing rates and practices. The Philippines parties offer no support for their argument that more was required under the Administrative Procedure Act ("APA") in this case. Indeed, the courts have ruled that Commission actions involving the promulgation of prospective rules to implement

¹⁴ These elements are: (1) international transmission facilities, (2) international switching facilities, and (3) national extension (domestic transport and termination). These network elements are the same ones used in the ITU guidelines for the cost elements to be taken into account when determining accounting rates for international telephone service. See *ITU-T Recommendation D.140*, "Accounting Rate Principles for International Telephone Services," Geneva (1992), *Annex A*.

¹⁵ The *Permian Basin Rate Cases*, 390 U.S. 747 (1968), support the Commission's use of the tariffed component prices in establishing the benchmark rates.

¹⁶ Philippines parties Petition at pp.14-16.

Commission policy is not the adjudication of disputed facts in a particular case for which a trial-type hearing might be appropriate.¹⁷

The Commission's position is also supported by *United States v. Florida East Coast Railway Company*.¹⁸ In that case, the Court found that language in the Interstate Commerce Act authorizing the Interstate Commerce Commission to prescribe a rate "after hearing," was not equivalent to a requirement that a rule be made "on the record after opportunity for an agency hearing," and did not trigger stricter requirements of other provisions of the APA in rulemaking proceedings. In addition, the Court held that the requirement of a "hearing" in the statute did not by its own force require the Commission to either hear oral testimony or permit cross-examination.¹⁹ In this case, the Philippines parties were fairly advised of what the Commission proposed to do, well in advance of the entry of a final order. It gave them time to formulate and to present objections to the Commission's proposal. Therefore, under *Florida East Coast Railway Company*, the "hearing" requirement under Section 205 has been met.

In any event, the Commission has allowed for parties to challenge its benchmark determination on a case-by-case basis with evidence that foreign carriers will be prevented from recovering the incremental cost of providing international termination service.²⁰ In light of this additional safety valve, the Philippines parties cannot be heard to argue that their due process rights have been violated.

¹⁷ *AT&T v. FCC*, 572 F. 2d. 17 at 22.

¹⁸ *United States v. Florida East Coast Railway Company*, 410 U.S. 224 (1973).

¹⁹ *Id.* at 240.

²⁰ *Benchmarks Order* at ¶ 291.

C. Section 211

As demonstrated above, the Commission has acted well within its authority to determine just and reasonable practices and charges in connection with international services. Further statutory authority for the Commission's action is found in Section 211 of the Act, which requires all contracts between common carriers, whether subject to the Act or not, be filed with the Commission.²¹ The Philippines parties assert that the Commission lacks the authority to direct a U.S. carrier what to pay a third party for services.²² However, the contractual nature of accounting rate agreements does not shield them from Commission scrutiny and action if necessary to protect the public interest. Consistent with Section 211, the Commission's rules require all operating agreements between U.S. carriers and its foreign correspondents to be filed with the Commission.²³ The Commission has held that Section 211 of the Act authorizes it to modify or abrogate carrier-to-carrier contracts as required by the public interest.²⁴ The D.C. Circuit has recognized the Commission's power to prescribe a change in contract rates when it finds them to be unlawful, and to modify other provisions of private contracts when necessary to serve the public interest.²⁵ Therefore, claims that accounting rate agreements are

²¹ 47 U.S.C. § 211.

²² Philippines parties Petition at pp. 9-10.

²³ 47 C.F.R. § 43.51.

²⁴ *Interconnection Facilities Provided to the International Records Carriers*, 63 FCC 2d 761, 766 (1977). See also, *Bell Systems Tariff Offerings*, 46 FCC 2d 413, 431 (1974) and *American Broadcasting Co. v. FCC*, 643 F2d 818 (D.C. Cir. 1980) (the Commission can review contracts and, where necessary, can cause them to be modified).

²⁵ *Western Union Telegraph Co. v. FCC*, 815 F. 2d. 1495, 1501 (D.C. Cir. 1987), (citing *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) and *United Gas Co. v. Mobile Gas Corp.* 350 U.S. 332 (1956)).

essentially private contracts and beyond Commission review and prescription authority are meritless.

If the Philippines parties prevail with this contention, then it would render "the filing requirement a meaningless exercise."²⁶ Indeed, the role of the Commission in protecting U.S. consumers in the area of international communications would be pointless if the Commission were unable to act to prevent unjust and unreasonable practices contained in above-cost accounting rate agreements. The actions taken by the Commission in its *Benchmarks Order* flow directly from its statutory authority to act in protecting the public from unjust and unreasonable rates, whether found in a contract or tariff.

D. Review of Conduct Outside the United States

The Philippines parties contend that the Commission cannot and should not examine the internal markets of a foreign jurisdiction in determining whether international settlements rates are lawful. This argument is specious at best. International communications cannot be viewed in a vacuum, and the regulation of such communications in the United States necessarily takes into account actions on the foreign end in order to protect the U.S. public interest. To be sure, the Commission's authority to act lies within the United States, but the Commission is not required to turn a blind eye to events that occur outside U.S. borders.

There is ample precedent for Commission examination of facts and circumstances in foreign countries as a basis for the promulgation of domestic policy and regulations.

²⁶ *Interconnection Facilities Provided to the International Records Carriers*, 63 FCC 2d 761, 766 (1977).

Indeed, such examination is commonplace in the regulation of U.S. international services. For example, when U.S. affiliates of foreign carriers seek to provide international services from the United States, the Commission has examined whether U.S. carriers enjoy "effective competitive opportunities" in foreign markets as part of its Section 214 public interest analysis.²⁷ As well, the Cable Landing License Act allows the Commission to deny an application for a cable landing license if to do so would assist U.S. carriers in securing rights to land a cable in foreign countries.²⁸ In these and other instances, the Commission's actions have been directed at U.S. carriers; yet, the potential for harm to competing U.S. carriers and U.S. consumers emanates from conduct occurring *outside* the United States.

Here, excessive settlement rates are a result of conduct occurring on the foreign end; however, the remedy that the Commission imposes is through regulatory oversight of U.S. carriers' settlement payments - - an action that is completely within the Commission's jurisdiction. The Philippines parties' contention that the Commission has no authority to examine the conduct, practices or charges of foreign carriers in formulating its own policies is completely without merit.

²⁷ See e.g., *In the Matter of AmericaTel Corp.*, 9 FCC Rcd 3993 (1994) (Commission examined the competitive conditions of the Chilean market as part of its analysis of a Chilean carrier's application to acquire control of a U.S. carrier). See also, *In the Matter of International Competitive Carrier Policies* 102 FCC 2d 812, 843 (1985), and *International Services* 7 FCC Rcd 7331(1992), and *Foreign Carrier Market Entry Order*, 11 FCC Rcd 3873 (1995). In addition, the Commission applies dominant carrier regulation to U.S. affiliates of foreign carriers on routes where the foreign carrier has the ability and incentive to discriminate against unaffiliated U.S. carriers, again on the foreign end. The anticompetitive conduct on the part of foreign carriers can have a detrimental effect on U.S. consumers, therefore the Commission has the authority to act.

²⁸ 47 U.S.C. §§ 35-39.

II. The Commission's Order is Consistent with International Obligations

A. International Telecommunication Union Regulations

The Philippines parties also contend that the Commission's actions violate international obligations that are a part of United States law. In particular, the Philippines parties argue that the Commission's Order violates the International Telecommunication Regulations.²⁹ However, nothing in the ITU Regulations require the Commission to cede sovereignty over telecommunications carriers that operate in the United States. The Commission's action is fully consistent with these regulations. Indeed, the Commission's actions are directed only towards U.S. carriers, not foreign carriers. The Commission would be surrendering its sovereign right to protect the public interest if it were to agree to allow U.S. carriers to settle at whatever rate foreign carriers deem appropriate. Instead, the Commission retains its sovereign right to protect the U.S. public interest by acting as it did.

Contrary to the Philippines parties claims, the Commission's actions are well within its obligations under the ITU Regulations. While the Commission has repeatedly supported multilateral solutions, it has always reserved the right to act to protect its sovereign interests. Indeed, in the Final Protocol to the Final Acts of the ITU Conference, the United States added a protocol which "reserves its right to take whatever acts it deems necessary, at any time, to protect its interests."³⁰ The Commission's action here is consistent with that reservation.³¹ In addition, the ITU Regulations urge parties

²⁹ International Telecommunication Regulations, articles 1.5 and 6.2.1.

³⁰ International Telecommunication Regulations, Final Protocol, No. 69.

³¹ While foreign carriers and administrations argue that the Commission is violating its ITU obligations, it is actually they who have been remiss in their obligations under international law. In particular, ITU-T Recommendation D.140, adopted in 1992, urged administrations to establish and revise

to take into consideration the relevant ITU-T Recommendations and relevant cost trends in their accounting rate arrangements. The Commission's Order helps U.S. carriers achieve that goal.

B. International Comity

The Philippines parties also argue that the *Benchmarks Order* violates the international law principle of comity between nations.³² International comity is the broad concept of respect among sovereign nations and is useful in determining "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation."³³ From the outset of their argument, the Philippine parties' contention is flawed. The *Benchmarks Order* not dictate what foreign carriers may charge for terminating traffic in their country, rather the order applies only to the settlement rates that carriers subject to [the Commission's] jurisdiction may pay for termination of U.S. originated traffic. Therefore, the Commission is not in a position where it must recognize a legislative, executive or judicial act of the Philippines, nor is it requiring that the Philippines government do anything to enforce this order. The order applies solely on carriers within the Commission's jurisdiction. The issues of international comity therefore do not arise in this context.

accounting rates that would be cost-oriented and take into consideration relevant cost trends. Despite the recommendation for "mutual agreement" to achieve this goal within five years, foreign carriers and administrations have made little progress in bringing these rates down to a reasonable cost-based level. The Commission's *Benchmarks Order* fully complies with this obligation. Instead of challenging the Commission's authority under these ITU Regulations to adopt its Order, foreign carriers and administrations should adopt policies and practices which comply with *their* obligation under the ITU Recommendations.

³² Philippines parties Petition at p. 20.

³³ *Restatement (Third) of the Foreign Relations Law of the United States*, § 101, comment e (1986). See also, *In the Matter of VIA USA, Ltd. et. al.*, 10 FCC Rcd 9540 (1995).

Conclusion

International telecommunications is moving in a new direction, away from the monopolistic, heavily subsidized world of the past, to one of competition and rational rate structures. The United States has been a leader in introducing competition to the international market, and the Commission has now taken the lead in ensuring that consumers are able to enjoy the benefits of cost-based accounting rates as the liberalization process unfolds abroad. MCI fully supports the Commission's efforts, which are fully within the scope of the authority granted to it by the Communications Act.

The Commission clearly has the authority to determine that the settlement rates paid by U.S. carriers to terminate their international traffic are unjust and unreasonable, and it may also prescribe rates that are just and reasonable as it did in the *Benchmarks Order*. Its action furthers the public interest by reducing the excessive settlement payments U.S. carriers make to foreign carriers, to the ultimate detriment of U.S. consumers. The Commission's action also is consistent with its ITU obligations to move accounting rates to a cost-oriented level by taking into account the relevant cost trends.

For all of the above-mentioned reasons, the Commission should deny the Philippines parties' petition for reconsideration of its *Benchmarks Order*.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Damion S. Hutchins, hereby certify that on the 24th day of October 1997, a true copy of the foregoing Opposition to the Philippines Parties' Petition for Reconsideration was delivered, either by hand or first-class mail, to the following:

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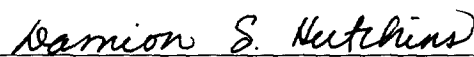
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